United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7503

In the

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FOR THE SECOND CIRCUIT

Docket No. 76-7503

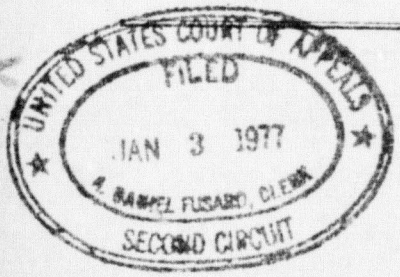
UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL
Plaintiffs-Appellants

vs.

GLENS FALLS INSURANCE COMPANY
Defendant-Appellee

Appeal from the United States District Court
for the District of Connecticut

BRIEF OF THE DEFENDANT—APPELLEE



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STATEMENT OF ISSUES

1. Where an automobile is put in the possession of the operator, by the owner, for the purpose of selling the automobile, has the operator the owner's permission to operate on a public highway, to go to and from work, when, at the time of the operator's obtaining possession the owner removed the registration plates and informed the operator that the car was unregistered and uninsured?

2. Is there any waiver of an insurance company's right to disclaim when it makes such disclaimer simultaneously with the filing of a substituted amended complaint, which concededly does not allege a cause within the coverage of the insurance policy?

3. Where for a period of six years, an insurance company fails to appear for its assured, or do anything whatsoever in his defense, does that company have any rights or powers with respect to the defense or handling of its assured's interests?

4. Is an appellant entitled to corrections of the finding of facts, where no supporting evidence is cited and the claims for correction are not briefed?

STATEMENT OF FACTS

The Defendant Does Not Accept Plaintiffs' Statement Of The Case.

On February 13, 1962, defendant's named assured, Pierce, owned a 1953 Volkswagen which was insured by the defendant under its policy number 35549 in the amount of $25,000.00. (App. 17a) Prior to that date, Pierce had purchased a second Volkswagen and transferred the registration from the old 1953 vehicle to the newly acquired vehicle. Thereafter, on or about February 3, 1972, Pierce agreed to let plaintiff Humphrey sell the 1953 Volkswagen and anything he received over $235.00 would belong to him. Pierce drove the '53 Volkswagen to Humphrey's home where he removed the registration plates and told Humphrey that the vehicle was unregistered and uninsured and could only be operated on the private way adjoining the latter's home property. (App. 15a-16a)

At the same time, plaintiff Humphrey owned a 1955 Volkswagen Micro Bus which was insured by him by a $100,000.00 policy with the plaintiff insurance company, United Services Automobile Association, under policy number N-190004-04. On February 13, 1962 plaintiff Humphrey tried to start his Micro Bus but it would not start. Thereupon he illegally

removed the registration plates from the Micro Bus and attached them to the unregistered Pierce vehicle and drove the Pierce car to his place of employment. (App. 16a)

On his way home from his work, he negligently struck and severely injured a man named Jerz. Plaintiff, United Services, immediately provided Humphrey with legal counsel for the defense of the motor vehicle criminal charges preferred against him, however, when the civil action was brought, it refrained from instructing its counsel to appear for its insured, Humphrey, claiming that defendant Glens Falls Insurance Company had the primary coverage and should assume its obligation to defend and also to pay all sums awarded Jerz up to the amount of its policy. (App. 17a-18a)

Jerz's complaint claimed $100,000.00 damages and named both Humphrey and Pierce as defendants, alleging that Humphrey was operating Pierce's car as the servant and agent of Pierce in furtherance of Pierce's business and with his consent, knowledge and permission. (App. 18a)

Because of the allegations of agency and permission, defendant on the advice of counsel, provided Humphrey with a defense even though defendant's own investigation indicated that no such permission or agency existed. The law firm of Pouzzner & Hadden, on the instructions of the defendant, filed an appearance for Pierce on July 17, 1962 and appeared for Humphrey on August 10, 1962. Approximately 7½ months later, Humphrey received a reservation of rights letter. (App. 19a, 130a)

Plaintiff United Services Automobile Association knew that plaintiff Jerz was claiming $100,000.00 damages and that Glen Falls policy limit was only $25,000.00 for bodily injury and $1,000.00 for medical payments. Plaintiff United Services

did not authorize or instruct counsel to appear for its assured Humphrey. (App. 21a, Par. 48)

At pre-trial sessions of the Jerz action, Jerz's settlement demand was $37,500.00 but no offer was made because Glens Falls denied coverage. The pre-trial judge recommended settlement in the sum of $30,000.00, but plaintiff United Services Automobile Association still refrained from appearing, and refused to take any active part in the lawsuit. (App. 19a, par. 35) Pouzzner & Hadden wrote plaintiff Humphrey on September 4, 1968 and acquainted him with the fact that other legal procedures were available to him to protect against loss because of any judgment which might be recorded against him, but further stated that their firm had not been retained to do this. (App. 45a-46a, Def's. Ex. No. 7)

On October 3, 1968, 6 years and 6 months after the Jerz action was started, Jerz moved for permission to drop Pierce as a defendant and to file an amended complaint. The motion was granted and a substituted complaint was filed which omitted all reference to Pierce's ownership of the vehicle, made no claim that Humphrey was operating with Pierce's permission or that he was doing so as Pierce's agent or in furtherance of his business. A withdrawal of the Jerz action against Pierce was filed and Pouzzner & Hadden upon the instructions of the defendant, moved for permission to withdraw from the case. After notice to Humphrey and hearing on the merits, the Connecticut Superior Court granted the motion, and withdrawal was filed on November 20, 1968. (App. 20a-21a)

Plaintiff United Services Automobile Association thereupon instructed counsel to appear for its insured, Humphrey, and such appearance was filed. Humphrey's new counsel moved for permission to implead Glens Falls as third party defendant,

but after a hearing, the State Court denied the motion. (App. 21a)

Upon the trial of the State Court case, a verdict of $42,000.00 against Humphrey was rendered in favor of Jerz. An additur was awarded by the presiding judge to bring the total amount of the verdict to $65,000.00. Upon appeal to the Connecticut Supreme Court, the original verdict was ordered reinstated. (*Jerz* v. *Humphrey*, 160 Conn. 219, 276 Atl. 2d 884)

FINDINGS

Plaintiff's statement of issues claims that several paragraphs of the finding made by Chief Judge Clarie are clearly erroneous. With regard to paragraph A 1 of plaintiffs' statement of issues, the defendant, in the following table, cites the supporting evidence for each of the paragraphs claimed to be "clearly erroneous". (See, F.R.C.P. §52(a), and 32 Am. Jur.2d 909, Federal Practice and Procedure §390):

Par. of Finding	Supporting Evidence	Record
7 and 9	Plaintiff Humphrey	App. 71a, L.210-215
9	Pierce	App. 73a, L.220-225 App. 74a, L.230-238 App. 75a, L.223-228
17	Pierce	App. 77a, L.226-231
18	Humphrey	Vol. III p. 150, L. 15-22 Vol. III p. 195, L.15-25
51	Plaintiffs' Exhibit No. 56	App. 38a
	Plaintiffs' Exhibit No. 53	App. 35a-37a

With regard to the issues claimed by plaintiffs in paragraph A 2 of their statement of issues, the plaintiffs have entirely failed to brief these claims and as a result this Court should not consider them.

United States v. *White*, (CA 7, 1971) 454 Fed.2d 435.

Platis v. *United States*, (CA 10, 1969) 409 Fed.2d 1009.

Brown v. *Sielaff*, (CA 3, 1973) 474 Fed.2d 826.

Chicago & W. Indiana R. Co. v. *Motorship Buko Maru*, (CA 7, 1974) 505 Fed.2d 579.

With the exception of paragraphs 27, 29, 30 and 34 of the proposed finding, the remainder of the paragraphs of the proposed finding are of no consequence. Many are correct statements of fact, others go beyond strictly established facts, but none of them are of any pertinence in this appeal, as seems to be conceded by plaintiffs' failure to brief these claims.

However, as to proposed finding, paragraph 27, the defendant refers the court to the contradictory evidence of plaintiffs' witness, appearing on page 82a of the appendix. It also appears that the proposed finding is contrary to law.

See: *American F & C Company* v. *Pennsylvania Thresher-men & Farmers Mutual Casualty Company*, (CA 5, 1960), 280 Fed. 453.

Proposed finding No. 29 is also contradicted by plaintiffs' witness in his testimony appearing in the appendix at page 81a. Of course, United Services legal duty to appear, defend and indemnify is quite sufficient to nullify the practice claimed in proposed finding No. 30 and in any event, such a practice would aid United Services in evading its responsibilites and would have no weight in this case. With reference to proposed finding stated in paragraph 34, it is an apparent con-

tradiction to plaintiffs' proposed finding 39 and plaintiffs' Exhibit No. 53, Appendix pp. 35a-37a. See also Rec. Vol. III pp. 143-144. In general, as to plaintiffs' attack upon the finding, defendant refers the court to those paragraphs of the finding of Chief Judge Clarie from paragraph 41 through 50, inclusive, appearing on the pages 20a and 21a of the appendix. Plaintiffs find these facts to be unexceptionable, and as such they render all plaintiffs' claims, with reference to the facts, futile.

ARGUMENT

I.

PERMISSIVE USE

The question of permissive use is governed by the case of *Mycek* v. *Hartford Accident and Indemnity Company*, 128 Conn., 140. In that case the operator was permitted by the owner to operate a truck for business purposes and in business hours. The accident took place after business hours and while the operator was using the truck entirely for purposes of his own. The court had no hesitancy in unanimously deciding that the operator was not within the coverage of the policy because he was operating without the permission of the owner and named assured.

Plaintiffs by somewhat tortuous reasoning, seek to bring the present case within the scope of the earlier case of *Dickinson* v. *Maryland Casua'ty Company*, 101 Conn. 369. This feat is attempted by way of a claim that the word "permission" is ambiguous and can mean either permission to use or permission to use for a specified purpose. However, the distinction between the two cases is simple and has been expressly

stated in *Mycek* to be the difference between a slight deviation which the court said occurred in *Dickinson* and a serious violation of the limits of the permission, such as we have in the present case.

It is undisputed that here the car was left with Humphrey for the purpose of selling the car. It is undisputed that the car was unregistered and under such circumstances no specific instructions were needed to limit Humphrey to operation off of public highways. The facts relating to the location of the car on Humphrey's premises clearly show that such operation as might be necessary for demonstration purposes, was quite feasible without the need of the car being operated on a public highway. (App. 15a, Par. 8)

The case of *Libero* v. *Lumbermans Mutua' Casualty Company*, 141 Conn., 574 is completely distinguishable from the present situation in that the named assured and owner in that case was an automobile repair shop and the operator was an employee of that shop. The actual question, therefore, as to permission, was entirely different from that in the present case. The question is whether or not Humphrey, who had permission to sell the car in question, and was limited to operation on private property, was outside of the scope of his permission when he illegally attached marker plates to the car and operated on the public highways, for the purpose of going and coming from the place of his own employment, purely for his own personal advantage. The answer to that question is self-evident. Humphrey was operating without permission and outside of the scope of such permission as he did have.

Freeman v. *Nationwide Mutual Ins. Co.* (1960) 147 Conn. 713, 716.

II.

Waiver of Right to Disclaim

Because there never was any permission from the named assured to the operator, Humphrey, permitting Humphrey to use the automobile as he was using it at the time of the accident, Humphrey never was an assured under the Glens Falls policy. While it is true that under the allegations in the complaint in the Superior Court case, *Jerz* v. *Pierce* and *Humphrey,* the Glens Falls Insurance Company was required to furnish a defense to Humphrey, the defense was required under Connecticut law because of the allegations in the negligence complaint, and regardless of the facts, or knowledge of facts. However, there is no Connecticut case, nor any case anywhere, which holds that such a requirement of defense makes the party defendant as assured under the policy.

The Smedley Co. v. *Employers Mut. Liab. Ins. Co.*, 143 Conn., 510.

Missionaries of the Co. of Mary, Inc. v. *Aetna Cas. & Surety Co.*, 155 Conn., 104.

7 Am. Jur. 2d. Auto. Ins. Sec. 162, p. 494.

Note, 50 ALR 2d 465, 480.

It is clear that although a notice of Glens Falls' position with reference to Humphrey was sent to Humphrey, his personal counsel and his insurance company, there was no legal requirement for any such notice.

Keithan v. *Mass. Bonding & Ins. Co.* (1970) 159 Conn., 128, 141.

Plaintiffs here claim that the lapse of time before the giving of such notice and after the commencement of the negligence action brought about an estoppel and waiver, which now prevents Glens Falls Insurance Company from raising the defense

that Humphrey never was an assured and never was entitled to indemnity protection by virtue of the Glens Falls' policy.

For numerous reasons this claim is completely unsound. Humphrey was in no way prejudiced by the lack of notice at the time of the original negligence action. His interests have been fully protected in that action from beginning to end. He has not been required to expend one nickel in defense of the action, in taking an appeal or in paying the judgment.

Breen v. *Aetna Cas. & Surety Co.*, 153 Conn. 633, 643.

Novella v. *Hartford Accident & Ind. Co.*, 163 Conn. 552, 563.

7 Am. Jur. 2d Automobile Ins. Sec. 171, p. 503.

Note, 50 ALR 2d 458, 465.

As pointed out, Glens Falls Insurance Company was compelled by law to furnish a defense to Humphrey which necessarily prevents any waiver or estoppel. In addition to being compelled by the Law of the State of Connecticut, the Glens Falls Insurance Company was, for the proper defense of its named assured, required to appear for and defend Humphrey. Both Humphrey and Pierce were co-defendants in the negligence action and Humphrey was explicitly alleged to be the agent of Pierce. No proper defense could have been afforded Pierce without including a defense of Humphrey. Therefore, no estoppel or waiver resulted from the appearance for Humphrey and the lack of a reservation of rights notice, where the disclaimer occurred a substantial time before trial and judgment.

Brown v. *Kennedy*, (1943) 141 Ohio St. 457, 48 N.E. 2d 857 cited with approval, 38 ALR 2d 1156;

Kearns Coa. Corp. v. *U.S. Fidelity & Guaranty Co.* (CA 2, NY) 118 Fed. 2d 33, 35.

When the original negligence complaint was amended and Pierce dropped from that action, there then remained no allegations in that lawsuit which would require a defense of Humphrey by Glens Falls Insurance Company. He had long since received notice of the position of Glens Falls, which company was then clearly entitled to cause its designated counsel to withdraw. As Chief Judge Claire said, "United Services cannot expect to keep Glens Falls permanently boxed into the liability when a substituted complaint changes the relationship and the responsibility of the insuring parties under the respective contracts." (App. p. 14a)

In the State court action *Jerz* v. *Humphrey*, when the substituted complaint was filed the original complaint was entirely superseded.

Robinson v. *Faulkner*, (1972) 163 Conn. 365, 306 Atl. 2d 857;

Wesley v. *DeFonce Construction Co.* (1966) 153 Conn. 400, 404, 216 Atl. 2d 811;

Pope v. *Town of Watertown*, (1950) 136 Conn. 437, 72 Atl. 2d 235.

"It was clearly the United Services business strategy throughout, in the handling of this litigation, to unload the responsibility for primary coverage on Glens Falls, if it were at all legally possible to do so." (Memorandum of Decision App. p. 11a, see record Vol. 6, Doc. No. 37, letter of 4/19/62, United Services to McGinn Company. letter of 6/12/62, McGinn Company to United Services, letter of 6/20/62, United Services to McGinn Company) As a matter of fact, United Services had a duty to defend, which existed even during the

period when it appeared on the face of the pleadings that its policy might be excess.

American F & C Company v. *Pennsylvania Thrashermen & Farmers Mutual Casualty Ins. Co.*, 280 Fed. 2d 453 (5th Cir. 1960);

Lujan v. *Gonzales*, 501 P.2d, 673, 677, 84 N.M. 219.

Obviously, plaintiffs main point in this appeal is their claim with regard to waiver and estoppel. It is worthy of note that the attorneys for the plaintiffs never even thought of this claim until the trial was under way. (Rec. Vol. II, pp. 56-65) The attorneys have now come up with another, and still later thought, recited in §4, page 13 of plaintiffs' brief. During the trial, the attorney for the plaintiffs took the position that the reservation of rights letter dated March 29, 1963 (App. p. 84a) was a valid reservation of rights letter, its only defect, according to the plaintiffs, was that it was not sent in time. Section 4 of plaintiffs' brief presents a question never submitted to the trial court. In a situation such as is presented by this case, a Court of Appeals will not consider issues which were not raised in the trial court. 32 Am. Jur. 2d, 906, Fed. Practice and Procedure, §387.

CONCLUSION

The essence of plaintiffs' appeal is a complaint with regard to the facts found by the trial judge. As has been demonstrated, the record fully substantiates every single finding. Furthermore, the credibility of the witnesses is the province of the trier, who may well have found some of plaintiffs' witnesses less than credible.

Plaintiffs' chief witness, Attorney Winer, who represented plaintiff Humphrey on behalf of United Services, testified that he offered plaintiff Jerz $45,000.00 to settle the *Jerz* v. *Humphrey* case. (App. 68a) Winer never reported to United Services that he had offered $45,000.00, nor even wrote to United Services to the effect that the verdict of $42,000.00 was less than the amount offered. (Rec. Vol. IV, pp. 331-332, L. 23-1) His colleague could recall no $45,000.00 offer. (Rec. Vol. IV, p. 309, L. 16-24) In plaintiffs' answers to interrogatories, dated March 22, 1974 the following appears on page 10.

> "56. Prior to the verdict recited in Paragraph 39 of your complaint, how much had you offered to settle the case of Jerz v. Humphrey?
>
> "Ans. During the trial, we gave consideration to offering $45,000.00 but the demand was then $90,000.00, so there was no offer."
>
> (Rec. Vol. 6, Doc. No. 37)

Dated at New Haven, Connecticut this 20th day of December, 1976.

Respectfully submitted,

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December 29, 1976

Wesley W. Horton, Esq.
41 Lewis Street
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Re: United Services Automobile Association, et al vs.
Glens Falls Insurance Company
Docket No. 76-7503

Dear Mr. Horton:

We are enclosing copies of the brief of the Defendant-Appellee in the above matter.

Very truly yours,

HADDEN, TAYLOR & KNOTT

By Clarence A. Hadden
Clarence A. Hadden

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